United States Court of Appeals

for the Second Circuit

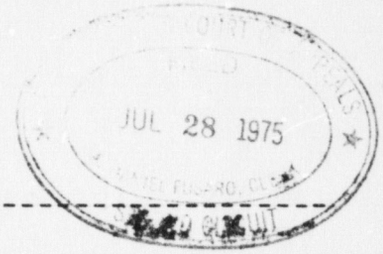
APPELLEE'S BRIEF

75-7202

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



NO. 75-7202

ANNIE TYSON, et als

PLAINTIFFS-APPELLANTS

V.

EDWARD W. MAHER, Successor to
Nicholas Norton, Commissioner
of Welfare, et als

DEFENDANTS-APPELLEES

BRIEF OF DEFENDANTS-APPELLEES (CORRECTED Briefs)

CARL R. AJELLO
ATTORNEY GENERAL
30 Trinity Street
Hartford, Connecticut

EDMUND C. WALSH
ASSISTANT ATTORNEY GENERAL
90 Brainard Road
Hartford, Connecticut

Attorneys for Defendants-Appellees

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ISSUES

Did the district court go beyond the proper scope of its review when it ordered the defendant-commissioner of welfare of the State of Connecticut, in the administration of the Food Stamp Program, to

1) conduct the interview of an applicant household, required by federal regulations prior to certification of its eligibility for participation in the food stamp program, in a manner not prescribed by federal regulations; and
2) accept applications from applicant-households for the replacement of lost, stolen or mutilated authorization to purchase (ATP) cards in a manner not prescribed by federal regulations.

STATEMENT OF CASE

This is an appeal from two provisions of the Judgment of the U. S. District Court, at Hartford, Connecticut, (Blumenfeld, J.) entered on February 28, 1975. The plaintiffs (an original plaintiff and nine intervenors) were applicants for and/or recipients of food stamp benefits under the State of Connecticut's Food Stamp Program. The State of Connecticut is a participant in the federal food stamp program, having satisfied the requirements for participation contained in the Food Stamp Act,[1] 7 U.S.C. §§ 2011-2026. The welfare department of the State of Connecticut is the State agency designated by the Secretary of Agriculture to carry out the provisions of the Food Stamp Act, supra,

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[1] Pursuant to 7 U.S.C. § 2019(e), the State agency of each State desiring to participate in the food stamp plan is required to submit to the Secretary of Agriculture, for approval, a plan of operation which satisfies the requirements set forth in said section.

in the State of Connecticut. The defendants in this action are the Commissioner of Welfare and the Director of the Food Stamp Program of the State of Connecticut.

Jurisdiction.

The District Court certified the action as a class action under Rule 23(a) and (b)(2), F.R.C.P. and found that a jurisdictional basis for the action existed under 28 U.S.C. § 1337 (1970) which grants original jurisdiction to the district courts of, inter alia, any civil action or proceeding arising under any Act of Congress regulating commerce.

Claims of the Plaintiffs.

The plaintiffs challenged the manner in which the defendants were operating the food stamp program in Connecticut in a number of respects. The District Court in its Memorandum of Decision, at pp. 4-5 [R] described the action as follows:

> "Plaintiffs in this case are a number of food stamp eligible Connecticut citizens who have experienced a variety of difficulties in either making their initial application or

during the course of their participation in the food stamp program. Their complaint raises several issues on behalf of themselves and the classes which they seek to represent in this action: (1) the state has failed to meet its obligation to 'undertake effective action. . . to inform low-income households concerning the availability and benefits of the food stamp program and insure the participation of eligible households.' 7 U.S.C. § 2019(e)(5)(1970); (2) the state has failed to allow applicants to apply for food stamps when they first express a desire to apply and has imposed great burdens upon applicants by refusing to conduct telephone interviews and only providing home interviews under rare circumstances; (3) the state fails to process applications within the 30-day period required by law; (4) the state has failed to grant automatic forward adjustments for those persons whose applications are not processed within 30 days; (5) the state has failed to provide immediate emergency authorizations to applicants with zero purchase requirement; (6) the state has failed

to provide immediate certifications for households on general assistance; (7) the state has failed to provde ATP cards prior to the next issuance date for those households whose ATP cards are either lost, stolen, rendered unusable or not mailed through administrative error; (8) the state has failed to implement a variable purchase option plan that conforms to federal stands; (9) the state has failed to implement a program to provide for 60-day continued certification for those persons who move within the state; and (10) the state is violating the plaintiffs' rights to equal protection of the law by refusing to provide benefits from the date of application, rather than the date on which an application is approved."[2]

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[2] The ten issues enumerated above, were governed by a complex of federal (FNS) administrative regulations and instructions. It would be roughly accurate to say that the district court found some basis, in whole or in part, for the plaintiffs' claims in the issues numbered (1), (2), (3), (4) and (8); and that the court found no basis for the claims made in the issues numbered (7) and (9); on issue number (5) the

Findings of the District Court.

The district court found, inter alia, "that there are serious deficiencies in the manner in which the state is operating its food stamp program"[3] and that the manner in which the defendant-commissioner was administering the "outreach" phase of the food stamp plan in Connecticut was in violation of federal law in that the defendants' interpretation of Title 7 U.S.C. § 2019 (as well as the interpretation of the Food and Nutrition Service (FNS) of the Department of

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[2] (continued) court found that defendants were not considering all applicant-households for eligibility for 30-day preliminary certification and ordered defendants to do so [R , p. 44-45]; on issue number (6) the court ordered the defendants to obtain from the towns, in Connecticut, information on the personnel standards for employees certifying general assistance households and to submit this information to FNS for its determination. If FNS finds that the local (town) personnel certifying households for general assistance meet the federal standards, the required pre-certification eligibility interview for food stamp can be dispensed with pursuant to 7 CFR § 271.4(a)(2), (1975); on issue number (10) the district court deferred action until further clarification would enable it to determine whether the convoking of a three-judge court would be required [R , p. 65]. (footnote not in original).

[3] Memorandum of Decision, p.2.

Agriculture) was too restrictive.[4] The district court found further that under the provisions of the Food Stamp Act, supra, "outreach" efforts should not be limited to informing low-income households of the food stamp program, but should also include efforts to insure the participation of eligible households. [R 57, pp. 14-15]
A. 114-115

Relief Ordered

The district court ordered, inter alia, that defendants submit, within 30 days, for court approval what it designated a "full participation" plan. [R 57, p. 68]. This plan was to include
A 168
provisions, tailored by the court, to remedy the several deficiencies which had been found, by the court, to exist in the defendants' operation of the food stamp program. The elements to be included in the plan are contained in the Memorandum of Decision [R 57, pp. 69-70] as follows:
A 169-170

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[4] The district court found that "[t]he defendants' watered down interpretation of the statutory mandate is supported by regulations and instructions issued by FNS. . . [W]ere this court to defer to the administrative construciton [by FNS] of 7 U.S.C. § 2019(e)(5), the defendants' conception of their responsibilities would clearly prevail." Memorandum of Decision [R 57, p. 12]
A. 112

"(a) The informational or "outreach" part of the plan must include, at a minimum, concrete programs and proposals for:

(1) intensifying efforts to secure immediately the cooperation of other federally-funded agencies and organizations, as well as community and private groups,

(2) the employment of a full time "outreach" director and the assignment of district employees as local "outreach" coordinators; and

(3) a full scale and continuing media campaign to inform low income households of the availability of food stamps, changes in the program, procedures for applying and certification office locations.

In addition, the defendants are to consider the possible use of a toll-free number which low income households could call to secure information about the program, and door-to-door canvassing in high-density, low-income neighborhoods. In preparing this plan, the defendants should be receptive to suggestions offered by the plaintiffs and should consult other states with successfully operating "outreach" programs.

(b) The "insurance" part of the plan must provide for the simplification and expedition of certification

procedures. The defendants are to review their current procedures to determine in what way they can be improved in the interest of insuring full participation. At a minimum, however, the plan must provide for:

(1) a written directive to and in-service training for local certification staff to insure that persons making initial inquiries about food stamps are informed of their right to apply for benefits immediately either in person or through the mail and are encouraged to do so; and

(2) the conducting of telephone and home interviews under a wider range of circumstances than currently allowed, including situations in which no household representative is able to visit the district office or circuit-riding location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care.

In addition, the defendants must consider soliciting the cooperating of federally-funded agencies and organizations and private and community groups in providing transportation services for applicants and assisting them in completing application forms. The current circuit-riding program should be continued and consideration should be given to its expansion."

In addition to the above requirement that defendants submit a "full participation" plan, the court also order [R 57, p. 70] A.170 the defendants to:

1) implement a variable purchase option plan which would satisfy the minimal requirements of FNS (FS) Instruction 734-6(IV).[5]

2) issue a written directive to local certification workers the purpose of which was to assure that consideration for eligibility for 30-day preliminary certification would be given to all applicant-households and that those households approved for preliminary certification would receive their authorization to purchase (ATP) cards expeditiously;

3) to prepare a report of the personnel standards for employees (of the towns in the State) certifying households for general assistance benefits and to submit it to the court and to counsel for plaintiffs (for their comments and/or suggested changes) and thereupon to submit the report to FNS for its determination as to whether the general assistance program

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[5] See Supplement To Defendants' Brief, p. G-1.

within all or parts of the state satisfied the requirements of the governing FNS (FS) Instruction 732-5;[6]

4) to take immediate action to insure that the applications of all public assistance households are processed within 30 days; and to provide an automatic forward adjustment to food stamp recipients for lost benefits; and to submit for court approval a regulation setting forth procedures for the implementation of this portion of the order; and to file monthly reports with the court, and counsel for plaintiffs, giving details of the processing of both public assistance and non-public assistance food stamp applications;

5) to promulgate a regulation providing for immediate replacement of ATP cards that are lost, stolen, mutilated or not mailed through administrative error; and providing also for informing participating households of this service and for permitting application [by telephone] under the same hardship circumstances set forth in the court-ordered "full participation" plan, supra;

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[6] See Supplement To Defendants' Brief, p. B-1.

6) to conduct in-service workshops for all district directors and local certification workers to explain the changes ordered by the court and to insure their full implementation; and

7) to file written reports, at 60-day intervals detailing, as of each reporting period, what action has been taken to comply with the several elements of this order, and what further actions are scheduled with regard to continuing programs.[7]

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[7] Although it is not mentioned in the court's decision, the plaintiffs and the defendants, near the commencement of this action, entered into a written agreement which was submitted to the court on April 1, 1974 [R20]. In that agreement the defendants agreed, inter alia, that thereafter they would:

1) process food stamp applications within 30 days;
2) grant "forward adjustment" to recipients for benefits lost because of delay in processing applications;
3) submit monthly reports to the court and to plaintiffs counsel detailing the processing of food stamp applications.

The defendants also implemented a "variable purchase" option plan, effective July 1, 1974. The court found [R57, p. 36] that this variable purchase plan failed to satisfy the minimal requirements of FNS (FS) Instruction 734-6 (See Supplement To Defendants' Brief, p.G-1)in that the option could not be exercised without turning in the ATP card at a district office in exchange for a substitute card.

The Issues Being Appealed.

The defendants are appealing only from the following two portions of the district court's orders:

1) That portion of the order which requires the defendant-welfare commissioner to include in the "full participation" plan, a provision for:

> ". . . the conducting of telephone and home interviews under a wider range of circumstances than currently allowed, including situations in which no household representative is able to visit the district office or circuit-riding location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care." [R 57, p. 70] A 17c (emphasis supplied);

2) That portion of the court's order requiring that:

> ". . . Within 30 days of this order, the defendants shall promulgate a regulation providing for emergency and immediate replacement of ATP cards that are lost,

stolen, mutilated or not mailed through administrative error. Said regulation shall provide for informing participating households of this service and for permitting application under the same hardship circumstances detailed above with regard to the 'full participation' program." [R57, p. 73]. A173

The ". . . same hardship circumstances" mentioned in paragraph 2, above, are elucidated elsewhere in the court's opinion as follows:

"The defendants shall therefore include in their written instructions a provision permitting telephone applications for replacement emergency ATP cards under the same set of circumstances to be provided for in their revised 'full participation' program. . ." [R57, p. 63]. A163

ARGUMENT

It is the claim of the defendant-commissioner of welfare that the district court, for the reasons hereinafter set forth, committed an abuse of its discretion when it prescribed, specifically, the manner in which the defendants were to administer the two facets of its food stamp program set forth above. Moreover, the district court did so, without finding that the defendant-commissioner was, in these areas, operating the food stamp program in a manner which was in conflict with the applicable federal law and/or regulations. By so doing, it has seriously interfered, in the two areas mentioned, with the ability of the defendant-commissioner to properly administer and control the food stamp program in the State of Connecticut.

I. The District Court's Order Concerning The Pre-Certification Interview.

The district court, in commenting on the requirement of an interview prior to certification of non-public assistant households, stated in its Memorandum of Decision:

"The defendants have admittedly adopted a far more restrictive policy than that allowed by the federal regulations and instructions. Telephone interviews are conducted under no circumstances and home interviews are conducted only where the applicant is elderly, housebound and is living alone." [R 57, p. 30] A 130

* * *

"Finally, it does not appear that the harsh impact of the defendants' refusal to conduct telephone interviews is currently being ameliorated by any effort on the defendants' part to seek the assistance of outside agencies or organizations to provide transportation for applicants to certification offices. The possibility of such cooperation for this very purpose is even recognized in FNS(FS) Instruction 732-6(IV), but was never acted upon by defendants."

[R 57, p. 31-32] A 131-132

The court then went on to order under "Relief" [R 57, p. 70] A 170 that the "full participation" plan must

include:

> ". . . the conducting of telephone and home interviews under a wider range of circumstances than currently allowed, including situations in which no household representative is able to visit the district office or circuit-riding location because of sickness, injury, lack of transporation or the presence of pre-school or other persons in the home requiring care." [R 57, p. 70] A 170

The district court did not find explicitly that the defendant-commissioner's policy with respect to the pre-certification interviews was in violation of federal law or regulations. However, it did make the observation that:

> "The defendants have admittedly adopted a far more restrictive policy than that allowed by the federal regulations and instruction. . ." [R 57, p. 35] A 135 (emphasis supplied).

The court then went on in the next paragraph of its opinion to summarize its discussion of the informing

and insurance elements of a full participation plan which it had begun on page 16 of its opinion [R] by stating:

> "It is clear from a review of this evidence that the defendants have failed to comply with the requirements of 7 U.S.C. § 2019(e)(5)." [R57, p. 32]. A132

The defendants do not interpret this statement to mean that the court found that defendants policy with respect to the conducting of telephone interviews was in violation of the federal statute (7 U.S.C. § 2019 (e)(5). But even if this was the meaning intended by the district court, the court did not find that either the FNS regulation § 271.4, nor FNS(FS) Instruction 732-1, Handbook § 2122 was not an appropriate interpretation of the governing federal statutes. The district court, in discussing the defendant-commissioner's policy, cited the federal regulation and instruction with apparent approval and used them as a standard of comparison for measuring the defendant's performance on this issue. [R 57, p. 30]. A130 It must be concluded therefore that the district court tacitly approved the

applicable FNS regulation and instruction on the question of the conducting of telephone and home interviews prior to certification as a proper interpretation by FNS of the governing federal statute.

If the foregoing analysis is correct, we must now turn to a study of the regulations and instructions adopted by FNS dealing with this question, to determine whether or not the court's orders, with respect to the conducting of the pre-certification interview, were consonant with the federal regulations, or, were instead, as the defendant-commissioner contends, an enlargement and a modification of the federal regulations and therefore a usurpation by the district court of the federal agency's congressionally-delegated role.

A. The Federal (FNS) Regulations And Instructions Governing The Pre-Certification Interview.

The district court, in its opinion, discussed some of the applicable federal regulations as follows:

"Federal regulations provide that such an interview may be conducted 'in a personal contact in the office, in a home visit, or by a telephone call. . .' Food Stamp Reg. § 271.4 (a)(2)(ii), 40 Fed. Reg. 1890 (1975).[8] However, FNS(FS) Instruction 732-1(II)(B)(2)[9] places some restrictions upon the use of telephone interviews. It provides:

> 'Persons who are unable to come into the office to be interviewed may be interviewed in a home visit or by telephone. When it is necessary to interview the applicant by telephone, the reason should be fully documented in the case file. Inconvenience to the applicant will not be sufficient reason for conducting the interview by telephone.' (emphasis in original)

In addition, Handbook, § 2122 at 21, adds that '[n]o household shall be interviewed by telephone for any two successive certifications without a face-to-face interview in the office or at home.'" [R 57, p. 30]. (footnotes not in original).

A.130

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[8] The complete regulation is at p.A-1 of Supplement To Defendants' Brief.

[9] See Supplement To Defendants' Brief, p. This Instruction was superseded by FNS(FS) Instruction 732-1, The Food Stamp Certification Handbook, August 5, 1974. (See Supplement To Defendants' Brief).

Nowhere in its opinion, however, did the district court discuss the "authorized representative" provision[10] contained in The Food Stamp Certification Handbook, FNS(FS) Instruction 732-1, August 5, 1974 (hereinafter referred to as "Handbook"). Under that provision it is provided that:

> "Where it is impossible for the head of the household or the spouse to make application for participation, a responsible household member may be designated as the authorized representative. If household members are unable to make application because of employment, or health or transportation problems, etc., a responsible adult outside the household may be designated under the following conditions:
>
> (1) The head of the household, the spouse, or other responsible household members cannot be interviewed.
>
> (2) The authorized representative has been designated in writing by the head of the household or the spouse.

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[10] Handbook, § 2130. (See Defendants' Supplement To Brief, atE-1).

3) The authorized representative is adequately aware of pertinent household circumstances.

It is important that the head of the household or the spouse prepare or review the application whenever possible, even though the authorized representative will actually be interviewed. It should be emphasized that the head of the household will be held liable for any overissuance which results from erroneous information given by the authorized representative."

Handbook, § 2131.

Although the district court made reference in its opinion to an "authorized representative" [R 57, p. 29], no further mention of this provision is made in the court's ensuing discussion of the pre-certification interview.

The Handbook, supra, devotes several sections to the "authorized representative" provisions,[11] and it is

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[11] Sections 2130, 2131, 2132, 2133, 2134, 2135 and 2136. Handbook, at pp. 24, 25 and 26. (See Defendants' Supplement To Brief, at E-1.)

apparent therefrom that the Secretary of Agriculture, acting through FNS, intended that the "authorized representative" was the primary means conceived by the Secretary to deal with those situations where the head of the household or the spouse would be unable to make application in person for food stamps. Thus, § 2131, supra, provides, in part:

> "Where it is impossible for the head of the household or the spouse to make application for participation, a responsible household member may be designated as the authorized representative. If household members are unable to make application because of employment, or health or transportation problems, etc., a responsible adult outside the household may be designated. . ."
>
> * * *
>
> "It is important that the head of the household or the spouse prepare or review the application whenever possible, even though the authorized representative will actually be interviewed. . ." (emphasis supplied).

B. The District Court Improperly Substituted Its Judgment For That Of The Federal Agency.

For whatever reason, the district court ignored the "authorized representative" provisions of the FNS Instruction, supra, when discussing "hardship circumstances"[12] [R 57, p. 73] A.173 and ordering the defendants to permit, in those situations, the pre-certification interview to be conducted by telephone or by home visit.

The result of the court's order, therefore, was not merely to require that the defendant-commissioner comply with the applicable federal regulations of FNS on the pre-certification interview requirement, but rather to comply with additional requirements which originated with the district court. It is clear from the foregoing discussion that the court's order requiring the telephone interview or home visit in the situations listed served to virtually

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[12] Referring to ". . . situations in which no household representative is able to visit the district office or circuit-riding location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care." [R 57, p. 70]. A.170

negate the provisions for the use of an "authorized representative" which FNS, under its congressional authority, had devised to deal with those situations where it would be difficult for an applicant to be interviewed in person at the district office or circuit-riding location.

Had the district court found that the defendant-commissioner was not complying with the federal regulations it could, of course, have ordered him to do so. And had the district court found that the federal regulations and instructions issued by FNS were not an appropriate interpretation of the governing federal statutes, the court could then strike them down.

But in the case at bar, the court did not find that the federal regulations and instructions were an improper interpretation of the Food Stamp Act, supra. At most, the district court found that:

> "The defendants have admittedly adopted a far more restrictive policy than that allowed by the federal regulations and instructions." [R 57, p30 supra].
> A 130

The proper remedy, therefore, would have been to order the defendants to comply with the federal regulations and instructions.

But, instead of so ordering, the district court substituted its own judgment, for that of FNS, as to how and in what circumstances, the pre-certification interview was to be conducted by telephone or in a home visit.

In the circumstances present in this case, the district court should have deferred to the construction placed upon the regulation (§ 271.4(a)(2) dealing with the pre-certification interview.)by the agency charged with its administration. Udall v. Tallman, 380 U.S. 1, 85 St. Ct. 792, 13 L Ed 2d 616, 625, (1965). Had the court so relied on FNS (FS) Instruction 732-1 (Handbook) § 2122, at 21, and § 2131, at 24, supra., it could not but have concluded that it was the intent of FNS to require that the pre-certification interview be conducted as a face-to-face interview except under the most unusual circumstances. Only where the head of the household or spouse was unable to come to the district office for the interview (§ 2122), and, further, where

it was impossible for another household member, or, if that were not possible, where it was also impossible for a responsible adult outside the household to be designated as an authorized representative, then, in that event, the State agency was empowered by FNS to conduct the interview by telephone or in a home visit. And even in those situations the Instruction cautioned:

> "No household shall be interviewed by telephone for any two successive certifications without a face-to-face interview in the office or at home." § 2122, supra.

This same section of the Handbook further stressed the stringency of this requirement by providing, inter alia, that:

> "When it is necessary to interview the applicant by telephone, the justification for such action must be fully documented in the case file. Inconvenience to the applicant is not considered sufficient justification." § 2122, supra.

In Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L ed 2d 616, (1965), the validity of certain oil and gas leases in the Kenai National Moose Range of Alaska were in question. Persons whose applications for oil and gas leases in the Range were rejected by the Department of the Interior on the grounds that the lands had been leased to prior applicants claimed that the prior applications were ineffective because the lands were closed to leasing by virtue of an Executive Order and a Public Land Order when the prior applications were filed.

The Court of Appeals reversed the District Court holding that the order creating the Moose Range in 1941, and Public Land Order issued by the Secretary in 1948 had withdrawn the lands in controversy from availability for leasing under the Mineral Leasing Act, and that the lands remained closed to leasing until they were reopened by a revised departmental regulation in 1958.

The Supreme Court reversed the Court of Appeals and held that:

". . . [S]ince their promulgation, the Secretary has consistently construed

both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record. . . . The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. McLaren v. Fleischer, 256 US 477, 481, 65 L ed 1052, 1053, 41 S Ct 577; Bowles v. Seminole Rock Co., 325 US 410, 413-414, 89 L ed 1700, 1702, 65 S Ct 1215."

13 L ed 2d at 618-619.

The Court further stated:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commissioner's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result

we would have reached had the question arisen in the first instance in judicial proceedings.' Unemployment Commissioner v. Aragon, 329 US 143, 153, 91 L ed 136, 145, 67 S Ct 245. . .'Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Power Reactor Co. v. International Union of Electrical, etc. 367 US 396, 408, 6 L ed 2d 924, 932, 81 S Ct 1529. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' Bowles v.

Seminole Rock Co., 325 U.S. 410, 413-414, 89 L ed 1700, 1702, 65 S Ct. 1215."
13 L ed 2d at 625-626.[13]

Mourning v. Family Publications Services, 411 U.S. 356, 93 S Ct. 1652, 36 L ed 2d 318 (1973), was an action in which the validity of a Federal Reserve Board regulation (Regulation Z) which had been issued by the Board in implementing the Truth in Lending Act[14] was under attack. The district court found that the respondent had failed to comply with Regulation Z in that it had extended credit to petitioner payable in four or more instalments, without making the disclosures required by the Act. The Court of Appeals reversed holding that the Board had exceeded its statutory authority in issuing Regulation Z since the regulation required disclosure in some credit transactions in which a finance charge had not been made, and alternatively, that the regulation

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[13] Accord, Thorpe v. Housing Authority of Durham, 398 U.S. 268, 21 L ed 2d 474, 89 S. Ct. 518 (1969).

[14] 82 Stat 148, 15 U.S.C. § 1604.

violated due process by creating a conclusive presumption that credit payments made in more than four instalments included a finance charge.

On certiorari, the Supreme Court reversed the Court of Appeals, and held, inter alia, that the Four Instalment Rule was not promulgated in excess of the Board's authority, is reasonably related to its objectives, is not inconsistent with the Truth in Lending Act, supra, and does not violate the due process clause as establishing an irrebutable presumption of fact, since it creates no such presumption.

The Court went on to state:

> "The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth in Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,'[footnote omitted] we have held

that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'[15] Thorpe v. Housing Authority of the City of Durham, [Supra]. . . [S]ee also American Trucking Assns. v. United States, 344 U.S. 298, 97 L Ed 337, 73 S. Ct. 307 (1953)."
36 L Ed 2d at 329-330.

The Court said further:

"Given that some remedial measure was authorized, the question remaining is whether the measure chosen is reasonably related to its objectives. We see no reason to doubt the Board's conclusion that the rule will deter creditors from engaging in the conduct which the Board sought to eliminate. . . That some other remedial

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[15] In the instant case the enabling legislation is 7 U.S.C. § 2013 which reads, in pertinent part:

* * *

"(c) The Secretary shall issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program." (footnote not in original)

provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chose courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. Northwestern Co. v. FPC, 321 US 119, 124 88 L Ed 596, 64 S Ct 451 (1944); National Broadcasting Co. v. United States, 319 US 190, 224, 87 L Ed 1344, 63 S Ct 997 (1943); American Telephone & Telegraph Co. v. United States, 299 US 232, 236, 81 L Ed 142, 57 S Ct 170 (1936)."
36 L Ed 2d at 331.

In Thorpe v. Housing Authority Of Durham, 393 US 268, 21 L Ed 2d 474, 89 S Ct 518 (1969), one of the issues involved was the intrepretation to be placed upon a Department of Housing and Urban Development (HUD) circular directing that before instituting an eviction proceeding local housing authorities operating all federally assisted projects should inform the

tenant in a private conference or other appropriate manner of the reasons for the eviction and provide him an opportunity to make such reply or explanation as he may wish. The defendants claimed the HUD circular was intended to be advisory, not mandatory. Evidence was introducted from HUD that ". . . the circular is as binding in its present form as it will be after incorporation in the manual. . . HUD intends to enforce the circular to the fullest extent of its ability. . ."[16]

In its opinion the Court said:

> "As we stated in Bowles v. Seminole Rock Co., [citation omitted], when construing an administrative regulation, 'a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'[footnote omitted]. . ."
> 21 L Ed 2d 481.

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[16] 21 L Ed 2d 480, n. 22.

II. Replacement Of Lost Or Stolen ATP Cards By Telephone.

The Order.

The second portion of the district court's orders from which the defendant-commissioner is appealing is that portion contained at p. 73 of the Memorandum of Decision [R57]. It reads as follows:

> "VI. Within 30 days of this order, the defendants shall promulgate a regulation providing for emergency and immediate replacement of ATP cards that are lost, stolen, multilated or not mailed through administrative error. Said regulation shall provide for informing participating households of this service and for permitting application under the same hardship circumstances detailed above with regard to the 'full participation' plan."

As indicated previously, the court's meaning of the term, "the same hardship circumstances," is clarified at p. 62 of the Memorandum of Decision where the court said:

"The defendants shall therefore include in their written instructions a provision permitting telephone applications for replacement emergency ATP cards under the same set of circumstances to be provided for in their revised "full participation" program. . ."

Thus, the "hardship circumstances" in which a telephone applicationfor a replacement for a lost or stolen ATP card must be permitted are those listed in the Memorandum of Decision, p. 70, i.e., ". . . situations in which no household representative is able to visit the district office because of sickness, injury, lack of transporation or the presence of pre-school or other persons in the home requiring care."

The Federal Regulations.

The applicable federal regulation governing the replacement of lost or stolen ATP cards is FNS (FS) Instruction 734-2, Rev. 2, Oct. 1, 1974. The specific section of that Instruction dealing with replacement of lost or stolen cards is Section VII C 2, pp. 19-20.[17]

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[17] A copy of the regulation is contained in Supplement To Defendants' Brief, p. F-1 through F-4.

As indicated above this Instruction was issued in revised form on Oct. 1, 1974.

The revised FNS (FS) 734-2 provides, in pertinent part, as follows:

"2 Before issuing over-the-counter ATP cards as replacements for ATP cards reported lost, stolen, or undelivered in the mail, the CU shall:

a Determine that sufficient time has elapsed for a normal mail delivery to be completed in the particular area.

b Determine whether the household is certified, whether the ATP card for which replacement is requested was issued, and whether it covers the current month.

c Require the recipient to sign an affidavit that the original ATP card will be returned to the CU if recovered by the household. The affidavit shall be filed in the case file and be avilable for evidence in the event that both ATP cards are transacted by the household.

d Be alert for households repeatedly requesting replacement of ATP cards. Consideration should

be given to other means of delivery after two consecutive reports of nondelivery in the mail."

The court, in its Memorandum of Decision cited, at p. 60-61, the pertinent portion of FNS (FS) Instruction 734-2(VI)(C)(1969) which was the governing FNS Instruction on this question prior to the Oct. 1, 1974 revision. That section read as follows:

"Emergency ATP Cards - In emergency cases (newly certified households in immediate need, loss or theft of ATP's, etc.) immediately prepare those ATP's which the household will need in order to participate before the next regular preparation of ATP's. Either the CU [certifying unit] or the MDPU [machine data processing unit] may prepare emergency ATP's provided that there are no delays in allowing the household to participate. When the monthly processing of executed ATP cards (paragraph D below) reveals that a household has used both regular and replacement ATP's to acquire more bonus coupons than they are certified to receive, the MDPU shall immediately notify the CU to determine if a claim against the household is warranted."

For purposes of this appeal, there is one significant difference between the 1969 revision and the latest Oct. 1, 1974 revision. That difference is that the latest revision requires that, before a replacement ATP card can be issued, ". . . the CU [certification unit] shall. . . require the recipient to sign an affidavit that the original ATP card will be returned to the CU if recovered by the household.

The affidavit shall be filed in the case file and be available for evidence in the event that both ATP cards are transacted by the household.

It was the practice of the defendant-commissioner to require such an affidavit before issuing a replacement ATP both before and after the revision of Oct. 1, 1974. [See Memorandum of Decision, [R 57] A.161 p. 61, where the opinion stated: "However, they [defendants] have presented evidence that emergency ATP cards are being issued where cards are lost, stolen or mutilated for households who come into a district office and fill out an affidavit."

The Court's Reasons.

As in the case of the pre-certification interview, supra, the district court did not find that the federal regulation FNS (FS) Instruction 734-2, which governed the issuance of replacement ATP cards, was contrary to the governing federal statutes.

Neither did the district court find that the defendants' practice in this respect was not in compliance with the federal requirements. The district court, in fact, found that:

> "Although the defendants are currently operating an emergency issuance procedure which substantially complies with Instruction 734-2 (VI)(C), the failure to issue written instructions violates Food Stamp Regulation § 271.4(a)(8), 40 Fed. Reg. 1891 (1975). . ."

But despite this failure to find neither that the federal instructions were an improper interpretation of the federal statutes, nor that the State agency was violating the federal regulations in the procedure it had adopted to issue replacement ATP cards, nevertheless, without so finding, the district court found that:

". . . the failure to make provision for hardship cases violates the overall purpose of the Food Stamp Act, to wit, 'to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.' 7 U.S.C. § 2011 (1970)."[18] Memorandum of Decision [R57] p. 62.
A.162

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[18] § 2011. Congressional declaration of policy
It is hereby declared to be the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized cooperatively by the States, the Federal Government, local governmental units, and other agencies to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.
Pub.L. 88-525, § 2, Aug. 31, 1964, 78 Stat. 703;
Pub.L. 91-671, § 1, Jan. 11, 1971, 84 Stat. 2048.

It is submitted that this was not a proper basis for district court to, in effect, write a regulation governing this area of the food stamp program which would be binding upon the defendant-commissioner.

First of all, as noted in the discussion of the pre-certification interview, supra, the court was mistaken when it held that FNS and the defendants had failed "to make provision for hardship cases. . ." As noted, supra, the court ignored the extensive provisions[19] which the FNS Handbook had made for an "authorized representative" to act for the household in situations where a household member was unable to come to the district office.

Secondly, without discussing the requirement contained in the revised FNS (FS) Instruction 734-2, supra, that the recipient must sign an affidavit before a replacement ATP card could be issued, the court, in effect, struck down that federal requirement. Without, first finding that FNS Instruction to be an improper interpretation of the federal statute, the district court exceeded the proper scope of its review in so acting.

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[19] See footnote 11 , p.22 , supra.

Thirdly, even if the FNS instructions had no such requirement of the execution of an affidavit prior to issuing a replacement ATP card, the district court's action, in this respect, would not have been a proper interpretation of the federal statutes (The Food Stamp Act).

It is a fundamental rule of statutory construction that meaning and significance must be given, if it can fairly and reasonably be done, to the whole statute or act and every part, section and provision thereof. D. Ginsberg & Sons v. Popkin 285 U.S. 204, Technicolor Motion Picture Corp. v. Westover, (C.A. Cal.,) 202 F 2d 224.

Another rule of construction is that where the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals. Yazoo & Mississippi Valley R.R. v. Thomas, 132 U.S. 174 (1889); Robinson v. Difford, (D.C. Pa.), 92 F. Supp. 145. The function of the preamble is to supply reasons and explanations and not to confer power to determine rights. 1 A Sutherland Statutory Construction, 4th Edition, 1972, § 20.03, p. 54.

The district court founded its statement that "the failure to make provision for hardship cases violates the overall purpose of the Food Stamp Act and thereupon cited the language contained in § 2011 of 7 U.S.C., supra, as the basis for its finding. However, a reading of § 2011 discloses that section to be a "preamble" section.

> "The preamble to a statute is a prefatory explanation or statement, often commencing with the word 'whereas', which purports to state the reason or occasion for making a law or to explain in general terms the policy of enactment." Sutherland, supra, § 20.03, p. 54.

Thus, as the court stated in Robinson, supra,:

> "Reliance on the preamble statement of section 2 [of the Securities Exchange Act of 1934] in order to alter the plain and unambiguous provisions of section 10 (b) would violate a basic canon of statutory construction that statements in the preamble may be referred to only for the purpose of clarifying an ambiguity in a statutory provision."
> 92 Fed. Supp. 148.

There is no claim that, in the case at bar, there is any ambiguity in active provisions of the Food Stamp Act in the sections subsequent to § 2011. It is clear from a reading of those sections that Congress was concerned that participation in the program be limited to those households that were eligible therefor. § 2014. And it is equally clear that Congress gave the Secretary the power to issues such regulations, not inconsistent with the Act, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program. 7 U.S.C. § 2013 (c).

Therefore, the finding of the district court that there had been a failure to provide for the replacement of lost, stolen or mutilated ATP cards in the situations which it described as "hardship circumstances" was unwarranted. The Secretary, through FNS, had made extensive provisions for these situations. The district court did not find that the federal regulations and instructions violated, in any way, the statutory provisions of the Food Stamp Act on the issue of replacing lost or stolen cards.

The same is true as to the district court's action with respect to prescribing the circumstances under which the defendant-commissioner would be required to permit the pre-certification interview by telephone. The FNS regulations and instructions had made provision for all of these situations.

The district court, therefore, improperly substituted its judgment for that of the Secretary to whom Congress had delegated the function of administering the food stamp program.

As the Supreme Court stated in Mourning v. Family Publications Service, supra,:

> "[T]hat some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. . ."
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> 36 L Ed 2d 331.

CONCLUSION

For the foregoing reasons, those portions of the district courts' orders which require the defendant-commissioner to conduct the pre-certification interview and to permit replacement of lost, stolen or mutilated ATP cards in a manner not required by federal law or regulations should be reversed, and an order entered which would allow the defendant-commissioner to administer the food stamp program in Connecticut in a manner consistent with the federal law and regulations.

Respectfully submitted,

CARL R. AJELLO
ATTORNEY GENERAL

BY Edmund C. Walsh
EDMUND C. WALSH
ASSISTANT ATTORNEY GENERAL
ATTORNEY FOR DEFENDANTS-
APPELLANTS
90 Brainard Road
Hartford, Connecticut 06114
Tel: 203-566-7014